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In the Supreme Court of the United States

OCTOBER TERM, 1990

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONER

v.

ARABIAN AMERICAN OIL CO., ET AL.

ALI BOURESLAN, PETITIONER

v.

ARABIAN AMERICAN OIL CO., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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QUESTION PRESENTED

Whether Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, prohibits employment discrimination outside the United States by an American corporation against an American citizen.

PARTIES TO THE PROCEEDING

The Equal Employment Opportunity Commission, which intervened as an appellant in the court of appeals, is the petitioner in No. 89-1838. Ali Boureslan, the plaintiff-appellant below, is the petitioner in No. 89-1845. Arabian American Oil Company and Aramco Services Company, defendants-appellees below, are the respondents in both cases.

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BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

OPINIONS BELOW

The panel and en banc opinions of the court of appeals (Pet. App. 1a-76a)[1] are reported, respectively, at 857 F.2d 1014 and 892 F.2d 1271. The opinion of the district court (Pet. App. 77a-82a) is reported at 653 F. Supp. 629.

JURISDICTION

The judgment of the court of appeals upon rehearing en banc was entered on February 2, 1990. On April 24, 1990, Justice

[1] "Pet. App." refers to the appendix to the petition in No. 89-1838.

White extended the time for filing a petition for a writ of certiorari to and including May 23, 1990. The petitions for writs of certiorari were filed on May 23, 1990, and were granted on October 1, 1990. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, are set forth at Pet. App. 86a-88a.

STATEMENT

1. Ali Boureslan, the plaintiff in this Title VII action, is a naturalized American citizen. The defendants are two Delaware corporations, Arabian American Oil Company (Aramco) and Aramco Services Company (ASC). During the period relevant to this case, Aramco explored for, produced, and refined oil and gas in Saudi Arabia. All of Aramco's shares were owned by Texaco, Exxon, Mobil, and Chevron, or their subsidiaries. Aramco's principal place of business was Dhahran, Saudi Arabia, but it was licensed to do business in Texas. ASC was a wholly owned subsidiary of Aramco; its principal place of business was Houston, Texas. J.A. 21, 24, 41; see Br. in Opp. App. 1a.

In 1979, Boureslan was hired by ASC to work as an engineer in Houston. A year later, Boureslan's request for a transfer to Aramco was granted, and he relocated to Saudi Arabia. In that country, Boureslan alleges, his supervisor systematically mistreated him because of his national origin, religion, and race, and respondents sought to create a record that would justify his termination. On June 16, 1984, Boureslan was discharged. His complaint alleges that the stated grounds for the termination were pretextual and that he was actually discharged because of his national origin, race, and religion. J.A. 7-10, 31-36.

2. After filing a charge of discrimination against Aramco with the EEOC and receiving a right to sue letter, Boureslan commenced this action against Aramco and ASC. His amended

complaint seeks relief under Title VII and also asserts pendent state law claims. J.A. 9-10. Aramco moved to dismiss the complaint for lack of subject matter jurisdiction, arguing that Title VII does not apply to discrimination outside the United States. J.A. 11-12. The district court agreed with that contention and dismissed the Title VII claims against both defendants. Pet. App. 77a-82a. The court also dismissed Boureslan's state law claims for lack of pendent jurisdiction and entered final judgment in favor of both Aramco and ASC. See *id.* at 82a; J.A. 44.

3. A divided panel of the court of appeals affirmed. Pet. App. 28a-82a. The court then granted rehearing en banc; upon rehearing, the court affirmed the district court's judgment by a 9-5 vote. *Id.* at 1a-27a.[2]

a. The en banc majority held that Title VII does not apply to discrimination outside the United States. In reaching that conclusion, it relied on the "canon of construction * * * that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." Pet. App. 3a (quoting *Foley Bros. Inc.* v. *Filardo*, 336 U.S. 281, 285 (1949)). Title VII, the majority concluded, "does not reflect the necessary clear expression of congressional intent to extend its reach beyond our borders." Pet. App. 7a.

The majority dismissed the contention that the statute's "alien exemption"—which provides that Title VII "shall not apply to an employer with respect to employment of aliens outside any State," 42 U.S.C. 2000e-1—demonstrates that Title VII was designed to apply to discrimination against American citizens outside the United States. Citing *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 95 (1973), the majority ruled that the alien exemption reflects "a congressional intent to provide Title VII coverage to

[2] In the court of appeals, the EEOC participated as an amicus curiae before the panel. After entry of the panel's decision, the Commission was granted leave to intervene for the purpose of seeking further review and participated as a party in the rehearing en banc. Pet. App. 85a. See 42 U.S.C. 2000e-5(f)(1) (authorizing court, in its discretion, to permit the Commission to intervene in a civil action upon the Commission's certification that the case is of general public importance).

aliens employed *within* the United States." Pet. App. 4a. Thus, it reasoned, the provision would remain a "meaningful and useful part of the Act" even if Title VII were interpreted not to apply to discriminatory conduct abroad. *Ibid.*

The majority found additional support for its interpretation in what it characterized as the "domestic focus" of the Act and in Title VII's "repeated references" to the "United States", "states" and "state proceedings." Pet. App. 5a. Because Title VII "accommodate[s] state employment discrimination proceedings," the majority continued, "[i]f Congress had intended the Act to apply in foreign countries," it would "have been even more careful to address conflicts with foreign discrimination laws." *Ibid.* The majority also found the Act to be "curiously silent" on issues raised by extraterritorial application of Title VII, saying that Title VII "fails to address venue problems that arise with foreign violations" and that the EEOC's "investigatory powers are limited to evidence obtained in the United States and its territories." *Ibid.*

If the Act were applied extraterritorially, the majority continued, its plain language would reach foreign employers of American citizens. The majority expressed doubt "that Congress ever intended to impose Title VII on a foreign employer who had the grace to employ an American citizen in its own country." Pet. App. 6a. Finally, the court contrasted Title VII with other statutes having undoubted extraterritorial effect—in particular, the Age Discrimination in Employment Act, 29 U.S.C. 630(f). In those other statutes, the majority observed, "Congress demonstrated * * * its awareness of the need to make a clear statement of extraterritorial application, address the concerns of conflicting foreign law, and provide the usual nuts-and-bolts provisions for enforcing those rights." *Ibid.*

b. Five members of the court dissented. The dissenting opinion concluded that "a fair and reasonable reading" of Title VII "compels the conclusion that Congress did, in fact, intend Title VII's broad remedial goals to encompass, and eradicate, an American employer's discriminatory employment practices against a United States citizen, even if the acts constituting such discrimination were carried out on foreign soil." Pet. App. 7a.

The alien exemption, the dissent explained, provides a clear expression of Congress's intent to apply the statute extraterritorially; "[i]f Congress had not envisioned an extraterritorial application of Title VII, a specific provision exempting only aliens from such coverage would not have been needed." *Id.* at 9a. The dissent found further support for its interpretation of Title VII in the alien exemption's legislative history and in the EEOC's interpretation of the statute. *Id.* at 12a-16a & nn.3-7.

SUMMARY OF ARGUMENT

Like Ali Boureslan, many Americans spend a portion of their careers working outside the United States for American employers. Foreign assignments provide employees with valuable experience and are essential for advancement in many firms. The question presented by this case is whether Title VII provides Americans with protection from discrimination on the basis of race, sex, national origin, and religion while they are employed by American employers abroad.

I. There is no doubt that Congress has constitutional authority to prohibit such discrimination. In determining whether Congress has exercised that authority here, it is appropriate to refer to the canon of construction that, unless a contrary intent appears, legislation is interpreted to apply only within the territorial limits of the United States. Title VII satisfies the requirement imposed by this presumption; the language of the statute clearly manifests Congress's intention to prohibit employment discrimination abroad by American employers against American citizens.

A. By its terms, Title VII reaches discrimination against Americans employed abroad. The Act prohibits discriminatory employment practices by "an employer"—a defined term including all firms that employ a specified number of employees and are engaged in an industry affecting commerce. The statutory definition provides no exclusion for employers conducting operations abroad, and the term "commerce" is defined to include foreign commerce. Accordingly, American corpora-

tions that employ American citizens abroad are among the employers subject to the Act.

B. Section 702 of the Act, 42 U.S.C. 2000e-1, provides that Title VII does not apply to "the employment of aliens outside any State." This exemption demonstrates that Congress intended to protect American citizens from employment discrimination abroad. Congress could not rationally have enacted an exemption for aliens (but not citizens) with respect to employment abroad while at the same time believing that Title VII could not apply extraterritorially in the first place. The court of appeals' surmise that Congress enacted the alien exemption in order to confer coverage on aliens employed within the United States is untenable. Indeed, the legislative history of the alien exemption confirms that its purpose was to limit the potential for conflicts with foreign law by withdrawing coverage from aliens abroad.

C. No provision of Title VII is inconsistent with its application to the employment of American citizens by American employers abroad. Contrary to the court of appeals' suggestion, Title VII does not create a venue gap for cases arising from discrimination abroad. And even if such a gap existed, it would reflect at most a decision to limit plaintiffs' choice of forum, not an intention to withdraw all protection from Americans employed abroad. Similarly, the statute's limitation on the scope of the EEOC's subpoena power does not suggest a limit on the statute's substantive provisions. The remainder of the EEOC's authority and the rights conferred on private plaintiffs embody no geographical limitation. As other statutes containing virtually identical subpoena provisions reflect, there is no necessary relationship between an agency's subpoena power and the scope of the statute it administers.

D. The EEOC, the agency charged with principal responsibility for administering Title VII, has interpreted the statute to apply extraterritorially. The Justice Department, which also has responsibilities in this area, has reached the same conclusion. These consistent constructions of the statute by the responsible

agencies confirm that Congress's intent was to apply Title VII to Americans employed by American employers abroad.

II. Concern for potential conflicts between Title VII and the laws of foreign states, on which the court of appeals placed great emphasis, does not justify restricting the statute to discrimination within the United States.

A. Congress has spoken to the possibility that Title VII may conflict with foreign law. The exemption for the employment of aliens outside the United States embodies the balance that Congress struck between the goals of eradicating employment discrimination and avoiding conflicts with foreign laws. The courts are not at liberty to restrike that balance.

B. Applied to discrimination by American corporations against American citizens, Title VII does not raise a serious prospect of irreconcilable conflicts with foreign laws. International law recognizes a state's right generally to prescribe legal rules for its nationals outside the state's boundaries. Title VII provides potential defenses to employers that are compelled by the law of the territorial sovereign to engage in conduct that would otherwise be prohibited by Title VII. Application of Title VII to cases such as this does not infringe upon the sovereignty of foreign states.

C. In providing for limited deference to state fair employment proceedings but not to foreign procedures, Title VII does not suggest that Congress intended to limit Title VII to discrimination within the United States. Congress's decision not to require reference of charges of discrimination to unfamiliar foreign proceedings scarcely suggests that it turned a blind eye to employment discrimination by American employers against American citizens abroad. Indeed, because Title VII supersedes all inconsistent state law, it is even less tolerant of conflicts with state law than it is of conflicts with foreign law. The statutory provisions accommodating state fair employment laws provide no basis for doubt as to Congress's intention to prohibit discrimination abroad.

D. In 1984, Congress amended the Age Discrimination in Employment Act to make clear its intention to prohibit age discrimination against Americans employed abroad. Contrary

to the court of appeals' suggestion, those amendments do not reflect an intention to distinguish between age discrimination and discrimination based on race, sex, national origin, or religion. Indeed, it would be anomalous to construe Title VII to provide Americans abroad with less protection from discrimination based on race, sex, national origin, or religion than from discrimination based on age. In fact, the legislative history of the ADEA amendments reflects that Congress believed that it was bringing the ADEA into line with Title VII and providing Americans working abroad with substantially the same protection from all forms of discrimination. Construing Title VII to be inapplicable abroad would resurrect (in reverse) the anomaly that the 1984 Congress acted to eliminate.

ARGUMENT

I. TITLE VII MANIFESTS A CLEAR CONGRESSIONAL INTENTION TO PROHIBIT DISCRIMINATION OUTSIDE THE UNITED STATES BY AMERICAN EMPLOYERS AGAINST AMERICAN CITIZENS

The issue in this case—whether Title VII protects American citizens against invidious employment discrimination by American corporations outside of the United States[3]—is exclusively one of statutory interpretation. Congress's power to legislate under the Commerce Clause, the primary source of constitutional authority for Title VII, is not confined to the territorial limits of the United States. As long as it acts within its enumerated powers, Congress can "regulate the actions of our citizens outside the territorial jurisdiction of the United States

[3] For purposes of Title VII, "the term 'State' includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U.S.C. 1331 *et seq.*]." This brief's references to the "United States" encompass all territory within the confines of these "States."

whether or not the act punished occurred within the territory of a foreign nation." *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377, 381 (1948).[4]

In determining whether Congress has exercised its authority to regulate extraterritorially, this Court has employed a canon of construction "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 285 (1949).[5] That canon "is based on the assumption that Congress is primarily concerned with domestic conditions" (*ibid.*); it also serves to protect against needless conflicts between our laws and those of other states, cf. *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963). The ultimate issue, however, remains one of legislative intent.

[4] Accord *Blackmer* v. *United States*, 284 U.S. 421, 437 (1932); *Patterson* v. *Bark Eudora*, 190 U.S. 169, 178-179 (1903); *Skiriotes* v. *Florida*, 313 U.S. 69, 73 (1941); *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 284-285 (1949); *Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 282, 285-286 (1952); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 17 (1963).

[5] See also *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 357 (1909); *Sandberg* v. *McDonald*, 248 U.S. 185, 195 (1918); *United States* v. *Bowman*, 260 U.S. 94, 98 (1922); *New York Central R.R.* v. *Chisholm*, 268 U.S. 29, 31-32 (1925); *Blackmer* v. *United States*, 284 U.S. 421, 437 (1932); *United States* v. *Flores*, 289 U.S. 137, 155 (1933); *Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 285 (1952); *Argentine Republic* v. *Amerada Hess Shipping Co.*, 109 S. Ct. 683, 691 (1989). The Court has retreated somewhat from the strict concept of territoriality advanced in *American Banana*. See *Steele* v. *Bulova Watch Co.*, 344 U.S. at 288; *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 704 (1962).

In other contexts, the Court has indicated that a different form of analysis may apply. See *United States* v. *Bowman*, 260 U.S. at 98 (presumption against extraterritoriality is not applicable to statutes designed to protect the United States government from fraud, because those statutes "are not logically dependent on their locality for the Government's jurisdiction"). See also *Tamari* v. *Bache & Co. (Lebanon) S.A.L.*, 730 F.2d 1103, 1107 n.11 (7th Cir.), cert. denied, 469 U.S. 871 (1984); *Schoenbaum* v. *Firstbrook*, 405 F.2d 200, 206 (2d Cir.), modified on other grounds, 405 F.2d 215 (1968), cert. denied, 395 U.S. 906 (1969). In this case, the Court need not determine the outer perimeter of the presumption against extraterritoriality or the scope of any exceptions to the presumption that may exist.

To rebut the presumption against extraterritoriality, Congress need not express its intent to regulate outside the United States in any particular way. At the most obvious level, a statute may explicitly be made applicable to foreign parties. See *Patterson* v. *Bark Eudora*, 190 U.S. 169, 173 (1903). So too, broad jurisdictional language suffices to sustain extraterritorial applications of federal statutes that prevent evasion of "the thrust of the laws of the United States in a privileged sanctuary beyond our borders." *Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 287 (1952). Other possibilities exist as well. In determining whether a statute reaches conduct abroad, courts may appropriately consult all materials customarily employed in statutory interpretation. See *Foley Bros.*, 336 U.S. at 285-291 (referring to the language of the statute at issue, its legislative history and "scheme", and administrative interpretations).

Interpreted in accordance with these principles, Title VII applies to discrimination outside the United States by an American employer against an American citizen. On its face, the statute prohibits discrimination by an employer engaged in an industry affecting interstate or foreign commerce, without regard to where the discrimination occurs. Understanding that the statute would apply to discrimination beyond the Nation's borders, Congress added an exemption withdrawing protection from aliens with respect to employment outside the United States. Congress must have understood that—were it not for the express exemption—Title VII *would* apply to aliens employed by American employers outside the United States. The exemption powerfully demonstrates that Congress intended Title VII to apply to the employment of *American citizens* outside this country. Nothing in Title VII supports a different interpretation. Finally, both the EEOC and the Justice Department, the agencies charged by Congress with enforcing Title VII, have consistently construed Title VII to apply to discrimination against American citizens abroad.

A. By Its Terms, Title VII Prohibits Invidious Employment Discrimination Against American Citizens Outside the United States

Title VII prohibits various discriminatory employment practices. 42 U.S.C. 2000e-2, 2000e-3. It is an "unlawful employment practice" for "an employer" (42 U.S.C. 2000e-2(a))

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

In general, the applicability of this provision to alleged employment discrimination is dependent upon whether the employer satisfies the statutory definition of "an employer," 42 U.S.C. 2000e(b). An employer is subject to Title VII if it has employed 15 or more employees for a specified period and is "engaged in an industry affecting commerce." *Ibid.* An industry affecting commerce is "any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce and includes any activity or industry 'affecting commerce' within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C. 401 *et seq.*]." 42 U.S.C. 2000e(h). Commerce, in turn, is defined as "trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof." 42 U.S.C. 2000e(g).[6]

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[6] Respondents have not contended that they lack the requisite number of employees or are not engaged in "an industry affecting commerce".

By their terms, these provisions reach employment discrimination occurring outside the United States. The statute's prohibition on "unlawful employment practices" is not limited to discriminatory practices occurring at any particular place, and the definition of employer includes both interstate and foreign commerce. Nothing in the statute makes the protection available to American citizens who are "individual[s]," "employees," or "applicants for employment" dependent on where they may be located when they are victimized by discrimination. In this respect, Title VII's jurisdictional provisions are similar to the "broad jurisdictional grant in the Lanham Act" upon which this Court relied in holding the trademark statute applicable to conduct outside this country. *Steele* v. *Bulova Watch Co.*, 344 U.S. at 286. See also *Branch* v. *FTC*, 141 F.2d 31, 34-35 (7th Cir. 1944).

B. Title VII's Exemption for Aliens With Respect to Employment Outside the United States Clearly Manifests An Intention to Protect American Citizens With Respect to Employment Outside the United States

1. In determining whether Title VII applies to discrimination by U.S. employers outside the United States, it is unnecessary to rely exclusively on the statute's broad jurisdictional provisions, for the "alien exemption" provision powerfully demonstrates Congress's intent to apply Title VII extraterritorially. That exemption is found in Section 702 of Title VII, 42 U.S.C. 2000e-1, which provides that the statute "shall not apply to an employer with respect to the employment of aliens outside any State." Against the background of Title VII's jurisdictional provisions, the thrust of this exemption is unmistakable. Congress understood that Title VII would apply to discrimination outside the United States, but chose not to confer protection on aliens outside this country. Accordingly, it fashioned an exemption for that group, limiting the statute's extraterritorial application to the employment of American citizens outside any State.

No other plausible explanation of the alien exemption exists. If Congress believed that the statute did not apply extraterritorially, it would have had no reason to include an exemption for a certain category of individuals employed outside the United States. Alternatively, if Congress believed that the statute would (or might) be interpreted to apply overseas but wished to withhold protection from both Americans and aliens employed abroad, the only sensible way to express that intention would have been to include an exemption encompassing the employment of all individuals abroad. The statute's jurisdictional provisions cannot possibly be read to confer coverage only upon aliens employed outside the United States. Thus, Congress could not rationally have enacted an exemption for the employment of aliens abroad if it intended to foreclose *all* potential extraterritorial applications of the statute.

In this respect, this case is similar to *Pennsylvania* v. *Union Gas Co.*, 109 S. Ct. 2273 (1990). In *Union Gas*, the Court noted that a provision exempting States from certain liability for hazardous waste cleanup manifested Congress's intention that States would be liable for cleanup costs beyond the scope of the exemption. The Court explained that the exemption "is, needless to say, an explicit recognition of the potential liability of States under this statute; Congress need not exempt States from liability unless they would otherwise be liable." *Id.* at 2278. The same inference should be drawn from the alien exemption in this case.[7]

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[7] The Eleventh Amendment imposes a more stringent clear statement requirement than the presumption against extraterritoriality; Congress may abrogate the States' Eleventh Amendment immunity "only by making its intention unmistakably clear in the language of the statute." *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 242 (1985). Compare *Foley Bros.*, 336 U.S. at 285 (presumption against extraterritoriality is "a valid approach whereby unexpressed congressional intent may be ascertained"). Thus, the reasoning of *Union Gas* applies *a fortiori* to this case. See also *Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.").

Title VII also contains an exemption for religious institutions "with respect to the employment of individuals of a particular religion to perform work connected with" the institutions' "religious activities." This exemption – like the alien exemption as we construe it – clearly withdraws coverage that would

2. With the exception of this case, all judicial decisions addressing the territorial scope of Title VII have concluded that the alien exemption reflects an intention to provide American citizens with protection from employment discrimination abroad.[8] The court of appeals, however, ruled that the exemption could plausibly be read as a means of "provid[ing] Title VII coverage to aliens employed *within* the United States," and suggested that the "negative inference" arising from the exemption was too insubstantial to sustain an extraterritorial application of the statute. Pet. App. 4a, 7a. This line of reasoning is strained and untenable. It requires an exemption to be read as a backhanded grant of coverage; what is more, the court's interpretive gymnastics embody a fundamental misconception of the principles of statutory interpretation that govern the extraterritorial application of statutes.

a. Whatever its implications may be, the alien exemption's office is not to confer statutory protection on aliens inside the United States. The plain language of another provision does that. As this Court noted in *Espinoza*, 414 U.S. at 95, aliens in this country are entitled to protection because they are among the "individuals" referred to in Section 703 of Title VII, 42 U.S.C. 2000e-2. If Congress had entertained any doubt as to whether Section 703 was sufficient to protect resident aliens, the only rational way to erase that uncertainty would have been to include a provision specifically conferring coverage on those individuals. The roundabout tactic of carving out an exemption

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otherwise exist. Further, courts have rejected claims, comparable to respondents' here, that Title VII should be construed to allow discrimination by religious institutions that is outside the scope of the exemption. See *McClure* v. *Salvation Army*, 460 F.2d 553, 558 (5th Cir.), cert. denied, 409 U.S. 896 (1972); *EEOC* v. *Pacific Press Publishing Ass'n*, 676 F.2d 1272, 1276-1277 (9th Cir. 1982).

[8] *Akgun* v. *Boeing Co.*, No. C89-1319D (W.D. Wash. June 7, 1990); *Seville* v. *Martin Marietta Corp.*, 638 F. Supp. 590 (D. Md. 1986); *Bryant* v. *International Schools Services, Inc.*, 502 F. Supp. 472 (D.N.J. 1980), rev'd on other grounds, 675 F.2d 562 (3d Cir. 1982); *Love* v. *Pullman Co.*, 13 Fair Empl. Prac. Cas. (BNA) 423, 426 n.4 (D. Colo. July 21, 1976), aff'd on other grounds, 569 F.2d 1074 (10th Cir. 1978).

from coverage for a different class would not have had the strangely generative effect of creating coverage that did not otherwise exist.

As this Court noted in *Espinoza* v. *Farah Mfg. Co.*, *supra*, the alien exemption does *confirm* Congress's intention to provide protection to aliens within the United States. If the statute could never apply to discrimination against aliens, it would have been unnecessary to exempt aliens with respect to their employment outside this country. It does not follow, however, that the exemption can plausibly be viewed as "meaningful and useful" (Pet. App. 4a) only to the extent it bears on aliens in this country.

To the contrary, the inferences that the exemption supports with respect to the employment of aliens within the United States and the employment of citizens abroad are inseparable and equally compelling. By withdrawing protection from aliens with respect to their employment outside the United States, the exemption establishes that two groups falling outside the exemption – in *Espinoza*, aliens employed inside the United States and, here, citizens employed abroad – are covered. Those inferences are in no sense alternatives to one another. Both flow equally from the alien exemption.

b. The court of appeals' suggestion that a "negative inference" is insufficient to support a statute's extraterritorial application misconceives the nature of the presumption against extraterritoriality. The presumption is an "approach whereby unexpressed congressional intent may be ascertained," *Foley Bros.*, 336 U.S. at 285, not a requirement of form. Title VII combines a broad grant of protection from discrimination with an exemption for the employment of aliens abroad. That combination is an entirely natural way to express an intention to confer coverage on Americans employed abroad. The presumption against extraterritoriality demands nothing more.

3. The legislative history of the alien exemption confirms that its function was to withdraw coverage from aliens abroad

(not, as the court of appeals suggested, to extend coverage to aliens in this country). In the 88th Congress, the alien exemption was initially included in H.R. 405, 88th Cong., 1st Sess. (1963). The committee report on this bill stated that the purpose of the exemption was "to remove conflicts of law which might otherwise exist between the United States and a foreign nation in the employment of aliens outside the United States by an American enterprise." H.R. Rep. No. 570, 88th Cong., 1st Sess. 4 (1963).[9] This explanation demonstrates that the exemption's function was what its form suggests—to withdraw coverage from aliens with respect to their employment abroad. The potential "conflicts of law" to which the report referred could only arise outside the United States; in stating that the exemption was designed to "remove" those potential conflicts, the report manifested the committee's understanding that Title VII would otherwise apply outside the United States.

The committee report on the Senate's employment discrimination bill, S. 1937, 88th Cong., 1st Sess. (1964), included a very similar explanation of the alien exemption: "Exempted from the bill are * * * U.S. employers employing citizens of foreign countries in foreign lands." S. Rep. No. 867, 88th Cong., 2d Sess. 11 (1964). Like its House counterpart, the Senate report made clear that the exemption's purpose was to limit the extraterritorial application of the statute in "foreign lands," not to extend coverage to aliens in this country. If there were any

[9] After H.R. 405 was reported to the floor of the House, the House Committee on the Judiciary held hearings on a number of civil rights bills, including H.R. 405. The committee report on H.R. 405 was incorporated in the record of those hearings. See *Civil Rights: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary on Miscellaneous Proposals Regarding the Civil Rights of Persons Within the Jurisdiction of the United States*, 88th Cong., 1st Sess. 2303 (1963). The upshot of the hearings was an omnibus civil rights bill, H.R. 7152, 88th Cong., 1st Sess. (1963). H.R. 405 was incorporated (with amendments not touching the alien exemption) into H.R. 7152, which in turn was subsequently enacted as the Civil Rights Act of 1964. See H.R. Rep. No. 914, 88th Cong., 1st Sess. 57 (1963) (additional views of Rep. Meader).

doubt as to the untenability of the court of appeals' understanding, the provision's legislative history would lay it to rest.

4. The alien exemption distinguishes Title VII from other statutes that this Court has held do not apply outside the United States. For instance, in *Foley Bros.* v. *Filardo, supra*, the Court relied very heavily on the fact that the Eight Hour Law—a statute obligating government contractors to pay overtime to employees who worked more than eight hours in a given day—drew "no distinction * * * between Americans and foreign laborers." 336 U.S. at 286. The Court continued (*ibid.* (emphasis added)):

> Unless we are to read such a distinction into the statute we should be forced to conclude, under respondents' reasoning, that Congress intended to regulate the working hours of a citizen of Iran who chanced to be employed on a public work of the United States in that foreign land. Such a conclusion would be logically inescapable although labor conditions in Iran were known to be wholly dissimilar to those in the United States and wholly beyond the control of this nation. An intention so to regulate labor conditions which are the primary concern of a foreign country should not be attributed to Congress in the absence of a clearly expressed purpose. * * * *The absence of any distinction between citizen and alien labor* indicates to us that the statute was intended to apply only to those places where the labor conditions of both citizen and alien employees are a probable concern of Congress.

By its terms, Title VII draws the very distinction whose absence this Court stressed in *Foley Bros.* In so doing, Title VII manifests Congress's intention to prohibit discrimination by American employers against American citizens abroad.

Indeed, the alien exemption first appeared in proposed fair employment legislation shortly after the decision in *Foley Bros.*, suggesting that it was conceived as a response to that decision. The decision in *Foley Bros.* was issued on March 7, 1949. Six weeks later, on April 29, 1949, Rep. Adam Clayton Powell introduced a fair employment bill, H.R. 4453, 81st Cong., 1st

Sess. (1949), that was apparently the first to include an alien exemption. Evidently, this bill was designed to avoid the problem created by the Eight Hour Law's failure to distinguish between Americans and aliens abroad.

Benz v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957), and *McCulloch* v. *Sociedad Nacional de Marineros de Honduras, supra*, involved attempts to apply American labor statutes to *aliens* employed aboard *foreign flag vessels*, which are analogous to foreign territory[10] – a point that was stressed in both cases. In *Benz*, the Court concluded that "Congress did not fashion [the LMRDA] to resolve labor disputes between nationals of other countries operating ships under foreign laws." 353 U.S. at 143. Similarly, in *McCulloch*, the Court framed the "basic" question as "whether [the NLRA] as written was intended to have any application to foreign registered vessels employing alien seamen." 372 U.S. at 19. The alien exemption precludes comparable applications of Title VII.

By virtue of the alien exemption, applying Title VII to employment discrimination abroad against American citizens by American corporations is entirely consistent with the reasoning of *Foley Bros.*, *Benz*, and *McCulloch*.

C. Other Provisions of Title VII Are Consistent With Its Application to Discrimination by American Employers Against American Citizens Abroad

The court of appeals identified two features of Title VII that it believed were inconsistent with extraterritorial application of the statute – the statute's venue provision and its limitation on the reach of the EEOC's subpoena power. Pet. App. 5a-6a. Upon analysis, neither provision weighs against applying Title VII to discrimination abroad against American citizens by American corporations.

1. Section 706(f)(3) of Title VII, 42 U.S.C. 2000e-5(f)(3), allows an action to be brought "in any judicial district in the State in which the unlawful employment practice is alleged to

[10] See, e.g., *Cunard S.S. Co.* v. *Mellon*, 262 U.S. 100, 123-124 (1923); *United States* v. *Rodgers*, 150 U.S. 249, 264 (1893).

have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice" – or, "if the respondent is not found within any such district, * * * within the judicial district in which the respondent has his principal office." Contrary to the court of appeals' suggestion, this provision does not create any significant venue gap for cases arising from discrimination abroad.

Only the first of the alternatives recognized by the statute – venue in a district in a State in which the unlawful employment practice has occurred – is necessarily unavailable in a case arising from discrimination outside the United States. An American corporation that has engaged in discrimination against an American employee may maintain employment records in the United States; the employee may be able to demonstrate that he or she would have been employed in this country but for the alleged discrimination; and, if venue is unavailable under either of those alternatives, the employer is subject to suit in the district in which its "principal office" is located. Identical language in the Jones Act, 46 U.S.C. 688, has been construed to refer to a defendant's principal office *in the United States*.[11] Thus, federal venue will be available in any case in which the defendant has an office in the United States.

[11] *Stewart* v. *Pacific Steam Navigation Co.*, 3 F.2d 329, 330 (S.D.N.Y. 1924) (L. Hand, J.) ("The phrase 'in which its principal office is located' clearly means in which the principal office of the foreign steamship company is located within the United States."). See *Arrocha* v. *Panama Canal Comm'n*, 609 F. Supp. 231, 235 (E.D.N.Y. 1985) (reaching same result under Title VII). This interpretation is consistent with the language of Title VII's venue provision. It gains further support from the principle that because "Congress does not in general intend to create venue gaps," "in construing venue statutes it is reasonable to prefer the construction that avoids leaving such a gap." *Brunette Machine Works Ltd.* v. *Kockum Indus., Inc.*, 406 U.S. 706, 710 n.8 (1972).

In *Yellow Freight System, Inc.* v. *Donnelly*, 110 S. Ct. 1566 (1990), this Court held that state courts have concurrent jurisdiction over Title VII actions. In our view, Title VII should not be construed to limit the venue of state courts hearing Title VII suits. See *Bainbridge* v. *Merchants & Miners Transp. Co.* 287 U.S. 278 (1932).

Even if Title VII were construed to create a venue gap for some cases arising out of discrimination abroad, it would not follow that Title VII should be interpreted to exempt all discrimination outside the United States. At most, the existence of such a gap would suggest that Congress was unwilling to allow Americans employed abroad a wider choice of venue than that available to victims of discrimination in this country. There is no indication that the venue provision was tied to Congress's understanding of the scope of the statute—and no other reason to assume that Congress intended Title VII's venue tail to wag the statutory dog.

2. For similar reasons, Title VII's limitation on the Commission's subpoena power does not justify restricting the Act to discrimination within the United States. At present, the Commission is empowered to issue subpoenas requiring attendance of witnesses and production of evidence "from any place in the United States or any Territory or possession thereof." 42 U.S.C. 2000e-9 (incorporating 29 U.S.C. 161(1)).[12] This limitation—which operates solely on Commission subpoenas, not (as the majority below suggested) on the EEOC's "investigatory powers"—falls far short of suggesting that the Commission lacks any authority to remedy discrimination against Americans abroad, let alone that the statute fails to reach such discrimination.

In all respects save its subpoena authority, the Commission's investigatory powers are subject to no geographical restriction.

[12] This provision was enacted in 1972. Before that time, the Commission secured evidence by means of demands that were enforceable by court order, but "the attendance of a witness [could] not be required outside the State where he is found, resides, or transacts business and the production of evidence [could] not be required outside the State where such evidence is kept." Civil Rights Act of 1964, Pub. L. No. 88-352, Tit. VII, § 710(a), 78 Stat. 264. In our view, the difference between this provision and the provision substituted in 1972 is not material to the question presented in this case. In one respect, however, the 1972 amendment has apparently enhanced the Commission's ability to investigate discrimination abroad. Comparable statutes have been held to permit service of a subpoena in this country for documents located elsewhere. See, *e.g.*, *CFTC* v. *Nahas*, 738 F.2d 487, 492 & n.11, 495-496 (D.C. Cir. 1984).

Section 706(a) of the Act, 42 U.S.C. 2000e-5(a), empowers the Commission to conduct an investigation "[w]henever a charge is filed" alleging an unlawful employment practice. For purposes of those investigations, the Commission enjoys "access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by [Title VII] and is relevant to the charge under investigation." 42 U.S.C. 2000e-8. Although the Commission's right of access may not be fully enforceable by subpoena, there is no suggestion that its investigatory authority is limited to discrimination occurring in the United States.

Nor is there any territorial limitation on the Commission's other functions under the Act. Nothing in the provisions conferring authority on the Commission to conciliate charges of discrimination, to initiate lawsuits, and to seek interim relief restricts the Commission to discrimination in the United States, 42 U.S.C. 2000e-5(b) and (f). The limit on the EEOC's administrative subpoena authority does not foreclose the Commission's performance of those functions—or impose any restraint on the pursuit of private actions under Title VII. Upon the filing of a lawsuit, the Commission or a private plaintiff may obtain evidence required for a judicial action by means of judicial subpoenas served in this country (Fed. R. Civ. P. 45), subpoenas to American citizens abroad (28 U.S.C. 1783), discovery under the Federal Rules of Civil Procedure, and procedures available under international agreements. See *Societe Nationale Industrielle Aerospatiale* v. *United States District Court*, 482 U.S. 522 (1987) (discussing the principles regulating the choice among these alternatives).

Finally, there is no necessary relationship between an agency's subpoena power and the scope of the statute it is empowered to enforce.[13] The statute authorizing the EEOC to issue sub-

[13] See *FTC* v. *Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1322 (D.C. Cir. 1980) (noting the distinction between the FTC's authority to serve subpoenas outside the United States and "the larger question of the FTC's authority to investigate both domestic and foreign corporations whose actions have harmful effects on U.S. commerce").

poenas compelling the attendance of witnesses "from any place in the United States or any Territory or possession thereof" (42 U.S.C. 2000e-9 (incorporating 29 U.S.C. 161(1)) is virtually identical to provisions conferring subpoena authority on many other federal agencies, some of which administer statutes reaching conduct outside the United States.[14] A limitation on Title VII's substantive provisions may not properly be inferred from the scope of the Commission's subpoena authority.

D. The EEOC, the Agency Charged With Administrative Enforcement of Title VII, Has Interpreted the Statute to Apply to Discrimination Against Americans Abroad

The EEOC has consistently construed Title VII to apply to discrimination against American citizens outside the United States. In 1975, the EEOC's General Counsel, in a letter to Senator Frank Church, stated that "[t]he language of Title VII indicates a Congressional intent to make the Title applicable to American citizens employed by American companies operating overseas." J.A. 48. If the alien exemption "is to have any meaning at all," the letter explained, "it is necessary to construe it as expressing a Congressional intent to extend the coverage of Title VII to include employment conditions of citizens in overseas operations of domestic corporations at the same time it excludes aliens of the domestic corporation from the operation of the statute." J.A. 49. The letter added that this construction was consistent with the purposes of the statute, noting that "[o]verseas employment practices of covered employers can have a very substantial impact on the employment opportunities in domestic corporations." *Ibid.*

In 1984, the Chairman of the EEOC testified before a subcommittee of the Senate that the alien exemption was indicative of an intention to prohibit discrimination against

[14] For instance, the subpoena authority that the Commission enjoys under the ADEA, a statute applying abroad, is limited to compelling the attendance of witnesses and the production of evidence "from any place in the United States." 15 U.S.C. 49 (incorporated in 29 U.S.C. 209, 626(a)). The SEC's authority under the Securities Exchange Act of 1934 embodies the same limitation. 15 U.S.C. 78s(b).

Americans abroad.[15] The Commission adhered to that interpretation of the statute in a decision issued in 1985. EEOC Dec. No. 85-16, Empl. Prac. Dec. (CCH) ¶ 6856 (Sept. 16, 1985). Citing the alien exemption and district court decisions sustaining Title VII's extraterritorial application, the Commission concluded that "the Act does apply to covered employers with respect to their employment of U.S. citizens outside the United States." *Id.* at 7072.[16] The EEOC is one of two federal agencies with primary responsibility for enforcing Title VII. Its interpretation, which is consistent with the language and legislative history of the relevant provisions, reinforces the conclusion that Congress intended the statute to apply to Americans employed by American employers abroad. See, *e.g.*, *EEOC* v. *Commercial Office Products Co.*, 486 U.S. 107, 115 (1988).

The Justice Department—the other federal agency with Title VII responsibility—has also interpreted the statute to reach discrimination abroad against American citizens. In 1975, an Assistant Attorney General testified before committees of both Houses of Congress that the alien exemptions in Sections 702 and 717 of Title VII imply that the statute applies outside the United States. He stated:

> It should be noted that both Executive Order 11478 and § 717 of Title VII specify that they are not applicable to "aliens employed outside the limits of the United States." The implication of this is that they do apply to United States citizens employed throughout the world.

[15] *Age Discrimination and Overseas Americans, 1983: Hearing Before the Subcomm. on Aging of the Senate Comm. on Labor and Human Resources*, 98th Cong., 1st Sess. 2-4 (1983) (testimony of Clarence Thomas).

[16] Recently, the Commission has issued a statement clarifying its policy with respect to the handling of charges of discrimination against corporations operating abroad. Policy Statement No. N-915.033, EEOC Compl. Man. (BNA), at 605:0055 (Sept. 2, 1988). The Commission has also applied Title VII to claims of federal employees employed by the federal government abroad. See *Cole* v. *Secretary of the Army*, EEOC Dec. No. 05890142 (Aug. 23, 1989); *Hedges* v. *Secretary of Defense*, EEOC Dec. No. 05900454 (June 1, 1990). Section 717 of Title VII, 42 U.S.C. 2000e-16, prohibits invidious discrimination in "[a]ll personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States)."

> With respect to discrimination in employment by private companies and individuals, Title VII of the 1964 Civil Rights Act, as amended, prohibits a broad range of "unlawful employment practices" by any private employer "engaged in an industry affecting commerce who has fifteen or more employees." * * * Once again the [statute] contains an exemption "with respect to the employment of aliens outside any State," which implies that it is applicable to the employment of United States citizens by covered employers anywhere in the world.[17]

These administrative interpretations of Title VII provide further support for the statute's application to this case. See *Foley Bros.*, 336 U.S. at 288-290.

II. CONCERN FOR POTENTIAL CONFLICTS WITH THE LAWS OF OTHER NATIONS DOES NOT WARRANT LIMITING TITLE VII TO DISCRIMINATION WITHIN THE UNITED STATES

In determining the scope of federal statutes, this Court has been sensitive to potential conflicts between our laws and those of foreign states.[18] In this case, the court of appeals placed great weight on what it perceived as Title VII's lack of attention to such conflicts. The court drew a contrast between Title VII's references to state fair employment laws and its treatment of foreign law. "If Congress had intended the Act to apply in foreign countries," the court stated, "we would expect Congress

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[17] *Foreign Investment and Arab Boycott Legislation: Hearings Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 1st Sess. 165 (1975) (testimony of Assistant Att'y Gen. Scalia). Accord *Discriminatory Arab Pressure on U.S. Business: Hearings Before the Subcomm. on International Trade and Commerce of the House Comm. on International Relations*, 94th Cong., 1st Sess. 87-88 (1975); *Discriminatory Overseas Assignment Policies of Federal Agencies: Hearings Before a Subcomm. of the House Comm. on Government Operations*, 94th Cong., 1st & 2d Sess. 87-89 (1975-1976).

[18] *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. at 21; *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. at 145-146. See also *Steele* v. *Bulova Watch Co.*, 344 U.S. at 289.

to have been even more careful to address conflicts with foreign discrimination laws. Yet the statute says nothing about potential conflicts with foreign discrimination laws." Pet. App. 5a. In the same vein, the court contrasted Title VII with statutes in which Congress had "demonstrated * * * its awareness of the need to * * * address the concerns of conflicting foreign law" (*id.* at 6a). This reasoning mischaracterizes Title VII and overstates the statute's potential to generate conflicts with foreign law.

A. The Alien Exemption Represents Congress's Solution to Potential Conflicts of Laws

Contrary to the court of appeals' suggestion, Title VII does speak to potential conflicts between Title VII and foreign law. The stated purpose of the alien exemption is to mitigate potential conflicts with foreign law—in the words of the relevant committee report, "to remove conflicts of law which might otherwise exist between the United States and a foreign nation in the employment of aliens outside the United States by an American enterprise." H.R. Rep. No. 570, *supra*, at 4. The alien exemption thus embodies Congress's accommodation of the goals of eradicating employment discrimination and avoiding conflicts with foreign law. Congress "alone has the facilities necessary to make fairly such an important policy decision." *Benz*, 353 U.S. at 147; see *McCulloch*, 372 U.S. at 22. Congress addressed the problem and struck a balance it considered appropriate; the courts are not at liberty to restrike the balance.

B. Properly Applied, Title VII Does Not Create a Serious Potential for Conflicts with International Norms or the Laws of Foreign States

1. Applied to discrimination by American corporations against American employees, Title VII does not give rise to significant conflicts with international norms or the law of foreign states. Both Boureslan and respondents are American

nationals.[19] As this Court has recognized, "the United States is not debarred by any rule of law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed." *Skiriotes* v. *Florida*, 313 U.S. 69, 73 (1941).[20] That is so even when the result is dual regulation; international law accepts the possibility that more than one state's law may apply simultaneously to a given course of conduct. Restatement (Third) of the Foreign Relations Law of the United States § 403(3) & comment d (1986).

In cases of dual regulation, application of Title VII is unlikely to generate serious conflicts with the laws of individual foreign states. In view of the emerging international consensus on employment discrimination, cases in which foreign law requires American corporations to discriminate on the basis of race, sex, national origin, or religion are likely to be rare.[21] In this case, for instance, respondents have not suggested that any Saudi law mandated discrimination against Boureslan. The possibility that the United States and another nation may both prohibit a particular form of discrimination—or that the other nation's laws neither compel nor prohibit discrimination that is unlawful under Title VII—does not give rise to a conflict of the type that

[19] See Restatement (Third) of the Foreign Relations Law of the United States § 213 (1986) ("For purposes of international law, a corporation has the nationality of the state under the laws of which the corporation is organized."). Cf. *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176 (1982) (under treaty between Japan and the United States, U.S.-incorporated subsidiaries of Japanese corporations are deemed corporations of the United States).

[20] Accord *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377 (1948); *Blackmer* v. *United States*, 284 U.S. 421, 436-437 (1932); Restatement (Third) of the Foreign Relations Law of the United States § 402(2) (1986) (except when it would be unreasonable, "a state has jurisdiction to prescribe law with respect to • • • the activities, interests, status, or relations of its nationals outside as well as within its territory").

[21] See Note, *Equal Employment Opportunity for Americans Abroad*, 62 N.Y.U. L. Rev. 1288, 1297-1299 (1987) (and authorities cited therein).

could justify overriding the legislative judgment reflected in the alien exemption.[22]

Even when foreign law compels discrimination that Title VII would otherwise prohibit, defenses available under Title VII serve to mitigate the resulting conflicts. If foreign law requires positions to be filled with persons of a particular sex, nationality, or religion, then that particular characteristic can be considered a bona fide occupational qualification within the meaning of 42 U.S.C. 2000e-2(e).[23] In certain cases, compliance with foreign law may also furnish a non-discriminatory justification for employment decisions that would otherwise be unlawful.[24] The

[22] By contrast, in *McCulloch*, 372 U.S. at 21, application of the NLRA to the foreign crews of foreign flag vessels would have given rise to a "head-on collision" with Honduran law. Under that law, a Honduran union was the exclusive bargaining agent of the ships' crews, and unions of other nationalities were prohibited from acting in that capacity. Recognition of an American union as the bargaining representative would have squarely violated Honduran law.

[23] That Section provides, in pertinent part:

> Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees • • • on the basis of [their] religion, sex or national origin in those instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise • • •.

In *Kern* v. *Dynaelectron Corp.*, 577 F. Supp. 1196 (N.D. Tex. 1983), aff'd, 746 F.2d 810 (5th Cir. 1984), the court held that membership in the Islamic faith was a bona fide occupational qualification for a position that involved flying helicopters to Mecca, since under Saudi Arabian law non-Moslems are barred from Mecca under penalty of death.

[24] In EEOC Dec. No. 85-10, Empl. Prac. Dec. (CCH) ¶ 6851 (July 16, 1985), a contract in which an American employer agreed to provide air traffic control services to a foreign country authorized the host country to review and approve the hiring of the air traffic controllers who were to perform the contract. The country withheld a work permit from a female air traffic controller, explaining that its customs and laws prohibited the employment of women in most jobs. Finding that there was a "current, authoritative, and factual basis" for the employer's belief that the host country would not admit the particular controller, the Commission held that there was "a legitimate, nondiscriminatory reason for not hiring [her]." *Id.* at 7053. See Restatement (Third) of the Foreign Relations Law of the United States § 441 & comment b (1986).

availability of these defenses reduces the likelihood that employers will be placed in a position in which it is impossible to comply with both Title VII and the law of a foreign state. Courts may also take foreign law into account in fashioning equitable relief.[25]

2. As the court of appeals noted, more difficult issues would be presented by Title VII's application to *foreign* employers with respect to the employment of Americans abroad. Pet. App. 5a-6a. The court erred, however, in embracing the all-or-nothing proposition that Title VII must be interpreted to apply either to all Americans employed abroad or to none of them. In *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 443 (2d Cir. 1945), the Second Circuit noted that the exceptionally broad language in the Sherman Act could be interpreted to embody accepted international limits on prescriptive jurisdiction. The court explained that courts are "not to read general words, such as those in [the Sherman Act], without regard to the limitations customarily observed by nations upon the exercise of their powers." *Ibid.* This Court has employed a similar approach in interpreting federal maritime statutes. *Lauritzen* v. *Larsen*, 345 U.S. 571, 577 (1953).[26]

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[25] The Commission's policy statement on the extraterritorial enforcement of Title VII requires field offices to contact the Commission's Title VII Division if an issue arises concerning a potential conflict with a foreign state's law; the Division then coordinates with the Department of State. EEOC Policy Statement No. N-915.033, *supra*, at 605:0057.

[26] See *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 382 (1959); *United States* v. *Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818). In *Lauritzen*, this Court held that the Jones Act – which creates a damages remedy in favor of "[a]ny seaman who shall suffer personal injury in the course of his employment" – does not apply to an injury suffered by a foreign seaman injured aboard a foreign flag vessel in a foreign port. The Court explained that "[b]y usage as old as the Nation, [American shipping] statutes have been construed to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law." 345 U.S. at 576-577. That approach, the Court continued, was in "accord with the long-heeded admonition of Mr. Chief Justice Marshall that 'an act of congress ought never to be construed to violate the law of nations if any other possible construction remains.' " *Id.* at 578 (quoting *Murray* v. *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)). See also *Weinberger* v. *Rossi*, 456 U.S. 25, 32 (1982) (noting this principle's force as applied "to the construction of statutes couched in general language which are sought to be applied in an extraterritorial way"); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. at 21-22; Steinhardt, *The Role of International Law As a Canon of Domestic Statutory Construction*, 43 Vand. L. Rev. 1103, 1142-1143 (1990).

International law recognizes a state's jurisdiction to prescribe rules governing its nationals' relations with one another, and the depth of the United States' interest in eliminating discrimination from those relationships cannot be gainsaid. Thus, application of American law to discrimination by an American corporation against an American citizen is entirely consistent with international law. Limiting principles applied in *Alcoa* and *Lauritzen* are available to avoid extreme applications of Title VII that would be violative of international law. Thus, Title VII does not present the stark choice that the court of appeals perceived, and concern about the consequences of applying Title VII to foreign employers cannot justify withholding its protections from Boureslan in this case.[27]

C. Title VII's Treatment of Conflicts with State Law Provides No Basis for Questioning the Extraterritorial Application of the Statute

Citing Title VII's references to state fair employment laws, the court of appeals suggested that Congress could not have in-

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[27] In its policy statement on the application of Title VII to discrimination outside the United States, the EEOC has recognized that "[w]here the discrimination takes place overseas, the status of the employer as an American or foreign company is significant." EEOC Policy Statement No. N-915.033, *supra*, at 605:0061.

The legislative history of the alien exemption suggests that Congress's focus was on prohibiting discrimination by "American enterprise[s]." H.R. Rep. No. 570, *supra*, at 4. See S. Rep. No. 867, *supra*, at 11 (referring to "U.S. employers" in "foreign lands"). This case, of course, presents only the question of Title VII's application to alleged discrimination by an American corporation against an American citizen.

tended to apply Title VII to discrimination outside the United States without including equivalent provisions addressing foreign laws. Pet. App. 5a. This reasoning rests on a misapprehension of Title VII. Title VII provides for limited deference to state fair employment *procedures* that are *consistent* with Title VII, but does not subordinate its *substantive* provisions to any *conflicting* requirements of state law. In this light, the fact that the statute also provides no express exception for potentially conflicting foreign laws creates no anomaly that undercuts Title VII's application abroad.

When a State has a law prohibiting the unlawful employment practice alleged in a particular case, the charging party is obligated to file a charge with the State prior to filing a charge with the Commission; the EEOC is obligated to afford the State an opportunity to remedy the practice before seeking its own relief; and, in making its determination as to whether there is reasonable cause to believe that a charge is true, the Commission must "accord substantial weight to final findings and orders made by State or local authorities" in proceedings triggered by those requirements. 42 U.S.C. 2000e-5(b) to 2000e-5(d).[28] The fact that Congress chose not to extend these procedures to foreign governments administering unfamiliar employment laws does not even remotely suggest that it intended to withdraw all protection from Americans employed abroad.

Title VII does not accommodate *conflicting* state fair employment laws. To the contrary, Title VII supersedes any state law that "purports to require or permit the doing of any act which would be an unlawful employment practice under Title VII." 42 U.S.C. 2000e-7. Thus, Title VII is, if anything, less tolerant of conflicts with state law than it is of conflicts with foreign substantive law. Even assuming for the moment that Congress can be expected to view foreign law as equivalent to state law, Title VII does not distinguish between them in a manner casting doubt on its application to Americans abroad.

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[28] Section 709(b), 42 U.S.C. 2000e-8(b), also authorizes the Commission to engage in various forms of cooperation with state and local fair employment agencies.

D. The 1984 Amendments to the ADEA Do Not Justify A Distinction Between Age Discrimination and Discrimination Based Upon Race, Sex, National Origin, or Religion

The court of appeals' emphasis on the distinction between Title VII and the 1984 amendments to the Age Discrimination in Employment Act was also misplaced. The ADEA amendments were enacted after several courts of appeals had held that that statute did not apply abroad.[29] The legislation's express purpose was to confer on American citizens employed abroad the *same protection* against age discrimination that, Congress was advised, Americans already enjoyed from other forms of invidious employment discrimination. Senator Grassley, sponsor of the ADEA amendments, explained that the amendments would "clear[ ] up an anomaly" between the ADEA and Title VII as applied to discrimination abroad. 129 Cong. Rec. 34,499 (1983).[30] The ADEA amendments thus provide no support for the view that the 1964 Congress that enacted Title VII was less concerned with eradicating discrimination against Americans abroad based on race, sex, national origin, and religion than the 1984 Congress was with age discrimination.[31]

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[29] *Zahourek* v. *Arthur Young & Co.*, 750 F.2d 827 (10th Cir. 1984); *Cleary* v. *United States Lines, Inc.*, 728 F.2d 607 (3d Cir. 1984). After the ADEA was amended, other courts reached the same conclusion regarding the original version of the statute. *Lopez* v. *Pan Am World Services, Inc.*, 813 F.2d 1118 (11th Cir. 1987); *DeYoreo* v. *Bell Helicopter Textron, Inc.*, 785 F.2d 1282 (5th Cir. 1986); *Ralis* v. *RFE/RL, Inc.*, 770 F.2d 1121 (D.C. Cir. 1985); *Pfeiffer* v. *William Wrigley Jr. Co.*, 755 F.2d 554 (7th Cir. 1985); *Thomas* v. *Brown & Root, Inc.*, 745 F.2d 279 (4th Cir. 1984). These decisions often noted that the alien exemption distinguished Title VII from the ADEA. *E.g.*, *Cleary* v. *United States Lines, Inc.*, 728 F.2d at 609.

[30] During hearings on the proposed legislation, the EEOC's Chairman testified that Title VII had been construed to apply to discrimination outside the United States. See *Age Discrimination and Overseas Americans, 1983: Hearing Before the Subcomm. on Aging of the Senate Comm. on Labor and Human Resources*, 98th Cong., 1st Sess. 2-4 (1983) (testimony of Clarence Thomas).

[31] The provisions of Title VII at issue in this case and the ADEA are not the only prohibitions on employment discrimination outside the United States. See Act of Sept. 28, 1971, Pub. L. No. 92-129, Tit. I, § 106, 85 Stat. 355 (pro-

Title VII, no less than the ADEA, manifests a clear intention to provide American citizens with protection from invidious employment discrimination abroad. The language of Title VII demonstrates that Congress foresaw the statute's application to discrimination outside the United States and tailored its coverage by exempting aliens with respect to employment outside the United States. Nothing in the statute is inconsistent with its application to employment discrimination by American corporations against Americans abroad. The courts below erred in failing to enforce Title VII according to its terms.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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hibiting discrimination against American citizens and their dependents on American military bases abroad); 50 U.S.C. App. 2407 (authorizing regulations prohibiting discrimination on basis of race, religion, sex or national origin to comply with foreign boycotts).

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